Pan Malaysian Equities Sdn Bhd v Fong Peng Wah (Wong Kah Seng; Third party)

HIGH COURT (SEREMBAN) — CIVIL SUIT NO 22–97 OF 1999
LOW HOP BING J
22 NOVEMBER 2004

Civil Procedure — Summary judgment — Triable issues — Claim by stockbroking company for amount due on individual trading account — Allegation of fraud by plaintiff — Whether estoppel to apply against defendant from denying authorisation to third party to effect trading of share account — Whether triable issues — Rules of the High Court 1980 O 14 r 1(2)(b)

The plaintiff, a stockbroking company, obtained summary judgment against the defendant, a customer, based on an individual trading account in which the defendant had appointed the third party, ie the dealer's representative to trade for the defendant in the purchase and sale of shares.

Beginning 27 July 1998, the plaintiff had issued a notice and letter of demand to the defendant based on the losses accrued to the defendant's account at the address given by the defendant to the plaintiff in the application form ('the Subang Jaya address') in which the defendant had agreed to give the plaintiff notice of change of the Subang Jaya address in the event of a change. There was no response by the defendant to these notices of demand. However, on 9 September 1998 the defendant vide his own letter to the plaintiff's chief executive officer confirmed that he was fully aware of the total outstanding contra and would settle the full sum due.

The defendant appealed against the summary judgment on the following grounds: (1) there were triable issues by reason of fraud perpetrated by a remisier who was said to be the plaintiff's agent, in collusion with the plaintiff's chief executive officer; and (2) the plaintiff had failed to prove that the share transactions were effected pursuant to the defendant's instructions and that the defendant had no knowledge of the contra losses.

Held, dismissing the appeal with costs:

(1) Order 14 r 1(2)(b) excludes the application of summary judgment when the action by the plaintiff is based on an allegation of fraud. In this case, there was not an iota of claim by the plaintiff based on an allegation of fraud against the defendant. In the circumstances, the issue of fraud alleged and raised by the defendant against the third party cannot come within the purview and ambit of O 14 r 1(2)(b). The defendant's reliance thereon was wholly misconceived (see para 9).

(2) There were no questions of triable issues arising from the delivery of the documents to the defendant at the wrong address. The absence of any notice of change of address from the defendant to the plaintiff was an affirmation of the defendant's Subang Jaya address (see para 12).

(3) The dealer's representative agreement clearly stated that 'the dealer is not and shall not be construed as the employee of the Company' (ie the plaintiff). The absence of any prior dispute by the defendant as manifested in the form of his silence in relation to the share transactions would militate against the defendant who had obviously turned a blind eye to the transactions, as a result of which, the defendant was estopped from denying his authorisation to the third party to effect the trading in the share transactions (see paras 16 and 17).

(4) In addition, the defendant's own letter dated 9 September 1998 containing his admission and confirmation of the outstanding contra losses would rebut the defendant's contention that the share transactions were traded without his instructions (see para 20).

[**Bahasa Malaysia summary**

Plaintif, sebuah syarikat broker saham telah memperoleh satu penghakiman terus terhadap defendan, seorang pelanggan berdasarkan akaun perniagaan individu di mana defendan telah melantik pihak ketiga sebagai wakil peniaga untuk dagangan jual beli saham bagi pihak defendan.

Bermula 27 Julai 1998, plaintif telah mengeluarkan notis dan surat tuntutan kepada defendan atas kerugian dalam akaun defendan pada alamat yang diberi oleh defendan kepada plaintif dalam borang permohonan ('alamat Subang Jaya') di mana defendan bersetuju untuk memberi plaintif notis pertukaran alamat Subang Jaya sekiranya terdapat sebarang pertukaran alamat. Defendan tidak mengambil sebarang tindakan terhadap surat tuntutan tersebut. Walau bagaimanapun, pada 9 September 1998 defendan melalui sepucuk surat kepada Ketua Pengarah Eksekutif bagi pihak plaintif dan mengesahkan bahawa beliau sedar terhadap jumlah kontra tertunggak dan akan melangsaikan jumlah tersebut.

Defendan merayu terhadap penghakiman terus atas sebab-sebab berikut: (1) terdapat isu yang patut dibicarakan disebabkan penipuan oleh remiser yang dikatakan ejen plaintif dan berpakat dengan Ketua Pengarah Eksekutif kepada plaintif; dan (2) plaintif telah gagal membuktikan bahawa urus niaga saham adalah dilaksanakan berdasarkan arahan defendan dan bahawa defendan tidak tahu mengenai kerugian kontra.

Diputuskan, menolak rayuan dengan kos:

(1) Aturan 14 k 1(2)(b) mengecualikan permohonan penghakiman terus apabila tindakan diambil oleh plaintif adalah berdasarkan tuduhan fraud. Dalam kes ini tidak ada sedikit pun yang dituntut oleh plaintif berdasarkan tuduhan fraud terhadap defendan. Dalam keadaan ini, isu fraud yang dituduh dan dibangkitkan oleh defendan terhadap pihak ketiga tidak boleh dibawa di bawah lingkungan A 14 k 1(2)(b). Pergantungan defendan

terhadap aturan tersebut disalah anggap sama sekali (lihat perenggan 8 dan 9).

(2) Tidak ada isu yang patut dibicarakan akibat penyerahan dokumen kepada defendan pada alamat yang salah. Tambahan pula, ketiadaan sebarang notis pertukaran alamat kepada plaintif, mengesahkan alamat defendan di Subang Jaya (lihat perenggan 12).

(3) Persetujuan wakil peniaga jelas menyatakan bahawa 'the dealer is not and shall not be construed as the employee of the Company' (iaitu plaintif). Tatacara defendan yang tidak berdiam diri dan tidak mempertikaikan urus niaga saham yang dijalankan sebelum ini akan menghalang defendan yang jelas tidak mengendahkan urus niaga tersebut, di mana defendan dihalang daripada menafikan bahawa kuasa telah diberi kepada pihak ketiga untuk terus menjalankan perdagangan saham tersebut (lihat perenggan 16 dan 17).

(4) Tambahan pula, surat defendan sendiri bertarikh 9 September 1998 mengandungi pengakuan dan pengesahan atas kerugian kontra tertunggak telah membantah tuntutan defendan bahawa urus niaga saham telah didagang tanpa arahannya (lihat perenggan 20).]

Notes

For cases on triable issues, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 6103–6173

For summary judgment under O 14, see 1 *Halsbury's Laws of Malaysia*, para [10.6–048]

Cases referred to

Bank Negara Malaysia v Mohd Ismail [1992] 1 MLJ 400 (folld)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

De Bussche v Alt (1878) 8 Ch D 286 (refd)

Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183 (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)

RHB-Cathay Securities Pte Ltd v Ibrahim Khan & other actions [2000] MSCLC 97 at 244 (refd)

Societe Des Etains De Bayas Tudjuh v Woh Heng Mining Kongsi [1978] 2 MLJ 267 (refd)

Syn Lee & Co Ltd v Bank of China [1961] MLJ 87(refd)

Legislation referred to

Rules of the High Court 1980, O 14 r 1(2)(b)

Edward CF Chin (Kris, Edward & Derek) for the defendant.
John Wong Yok Hon (Azim, Tunku Farik & Wong) for the plaintiff.

Low Hop Bing J:

APPEAL

[1] This is an appeal in encl 59 by the appellant-defendant ('the defendant') against the decision of the learned registrar who had on 11 November 2003 given summary judgment under O 14 of the Rules of the High Court 1980 ('O 14') in favour of the plaintiff in the sum of RM394,666.59 as at 31 May 1999 with contractual interest at the rate of 22% per annum calculated on a daily basis from 1 June 1999 until realisation on the principal sum of RM301,217.63 and costs on a solicitor-client basis.

FACTUAL BACKGROUND

[2] Pursuant to the defendant's documented application to the plaintiff on 27 February 1997, the plaintiff opened a share transaction account No F0148 with a credit facility of RM5 million for the defendant who had embarked on share transactions and incurred losses, as a result of which on 27 July 1998, the plaintiff issued a notice of demand to the defendant at No 35, Jalan USJ 11/3D, UEP Subang Jaya ('the Subang Jaya address') given by the defendant to the plaintiff in the application form in which the defendant agreed to give plaintiff notice of change of the Subang Jaya address in the event of a change. The defendant did not give the plaintiff any notice of change of address. This letter of demand was followed by the letter of demand issued by the plaintiffs solicitors to the defendant. There was no response by the defendant to these notices of demand.

[3] The defendant vide his own letter dated 9 September 1998 to the plaintiff's chief executive officer confirmed that he was 'fully aware of the total outstanding contra losses of amount RM301,217.63 owing to Kimara', the plaintiff's former name and would be doing his 'very best to settle the full sum mentioned above together with all interest charged'.

FRAUD

[4] It was submitted by Mr Edward CF Chin counsel for the defendant that the defendant had raised the issue of fraud perpetrated by a remisier who is said to be the plaintiff's agent, in collusion with the plaintiff's chief executive officer, for which the defendant had on 11 June 2001 lodged a police report, wherein he stated that his monthly salary as a medical salesman was RM3,500 while the line of credit was RM5 million. He added that all contract notes were sent to the Subang Jaya address. Wong Kah Seng who is the third party herein shares the Subang Jaya address.

[5] Reliance was placed on O 14 r 2(l)(b); *Societe Des Etains De Bayas Tudjuh v Woh Heng Mining Kongsi* [1978] 2 MLJ 267; *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; *Syn Lee & Co Ltd v Bank of China* [1961] MLJ 87; and *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 to support the defendant's contention that there are triable issues by reason of the said allegation of fraud.

[6] Mr John Wong Yok Hon, counsel for the plaintiff, contended that the issue of fraud raised for the defendant was against contemporary documents executed by the defendant and that the third party herein was not the employee of the plaintiff.

[7] On my part, in relation to an application for summary judgment under O 14, it is instructive to apply the dictum of Mohamed Azmi SCJ (as he then was) in *Bank Negara Malaysia v Mohd Ismail* [1992] 1 MLJ 400 when his Lordship in delivering the majority judgment of the then Supreme Court said at p 408 E–F as follows:

> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable.

[8] I must now consider the assertion advanced for the defendant. First, the so called O 14 r 2(1)(b) which the defendant has relied upon in order to support his contention that summary judgment should not be entered against the defendant. Without causing any embarrassment to the professional skill of the defendant's counsel, the so-called O 14 r 2(1)(b) does not exist at all, but the provision sought to be relied upon by the defendant should have been correctly cited as O 14 r 1(2)(b) which reads as follows:

> O 14 Summary Judgment
>
> 1 Application by plaintiff for summary judgment (O 14 r l)
>
> (1) ……
>
> (2) Subject to paragraph (3), this rule applies to every action begun by writ other than one which includes -
>
> (a) ; or
>
> (b) a claim by the plaintiff based on an allegation of fraud.

[9] A proper perusal of the plaintiff's claim makes it abundantly clear to me that it is made by the plaintiff, a stockbroking company, against the defendant, a customer, based on an individual trading account in which the defendant has appointed the third party, ie the dealer's representative to trade for the defendant in the purchase and sale of shares. There was not an iota of claim by the plaintiff

based on an allegation of fraud against the defendant. In the circumstances, the issue of fraud alleged and raised by the defendant against the third party cannot in my view come within the purview and ambit of O 14 r 1(2)(b), as a result of which the substratum of the defendant's submission is self defeating. The defendant's reliance thereon is wholly misconceived.

[10] Next, the judgment of Abdoolcader J (later SCJ) in *Societe Des Etains* cited for the defendant made no reference to any allegation of fraud and as such is utterly unsupportive of the defendant contention.

[11] In *Ng Hee Thong*, which referred to *Syn Lee* and *Malayan Insurance*, the judgment of Gopal Sri Ram JCA delivered in the Court of Appeal concerned, inter alia, service of the notices of demand to the addresses other than those which appeared in the guarantees, as a result of which triable issues were raised.

[12] In the instant appeal, the factual background narrated above revealed that the defendant's application form in exh A executed and submitted by the defendant to the plaintiff in order to obtain approval for the share transaction account gave the Subang Jaya address to which all subsequent contract notes, all other related documents and notices of demand were sent. There is in my view no question of any triable issue arising from the delivery of the documents to the defendant at the wrong address. Further the absence of any notice of change of address from the defendant to the plaintiff is an affirmation of the defendant's Subang Jaya address.

[13] Upon the above analysis of the authorities cited for the defendant, my conclusion is that they do not support the contention advanced for the defendant.

SHARE TRANSACTIONS

[14] It was contended for the defendant that the plaintiff had failed to prove that the share transactions were effected pursuant to the defendant's instructions and that the defendant had no knowledge of the contra losses.

[15] For the plaintiff, it was submitted that the defendant had at all material time instructed the third party herein to trade in all the share transactions on behalf of the defendant and that before the commencement of this action against the defendant, there was no dispute whatsoever by the defendant in relation to all such transactions.

[16] In my judgment, it is necessary to refer to exh G which is the dealer's representative agreement wherein para 7 expressly states that 'the dealer is not and shall not be construed as the employee of the company' (ie the plaintiff).

[17] The absence of any prior dispute by the defendant as manifested in the form of his silence in relation to the share transactions would, in my view, militate against the defendant who had obviously turned a blind eye to the

transactions, as a result of which, I hold that the defendant was estopped from denying his authorisation to the third party herein to effect the trading in the share transactions (see *RHB-Cathay Securities Pte Ltd v Ibrahim Khan & other actions* [2000] MSCLC 97 at 244, per Chan Seng Onn JC).

[18] Within our shores, the doctrine of estoppel in general, and estoppel in the form of silence in particular, eg by the defendant in the instant appeal, has found expression in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at 344F where Gopal Sri Ram JCA delivered judgment for the Court of Appeal and held, inter alia, as follows:

> The doctrine of estoppel is a flexible principle by which justice is done according to the circumstances. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. The maxim 'estoppel may be used as a shield but not a sword' does not limit the doctrine of estoppel to defendants alone. Plaintiffs too may have recourse to it. Estoppel may assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact which would destroy the cause of action.

[19] The learned JCA after referring to the judgment of Thesiger LJ in *DeBussche v Alt* (1878) 8 Ch D 286 at 314 held further that:

> Thus far we have dealt with the operation of the doctrine in the context of there having been offered some active encouragement by the party sought to be estopped. But we do not apprehend the law to be different when the encouragement comes in the form of silence.

[20] In addition, the defendant's own letter dated 9 September 1998 containing his admission and confirmation of the outstanding contra losses as alluded in the facts would, in my view, rebut the defendant's contention that the share transactions were traded without his instructions.

CONCLUSION

[21] By reason of the foregoing grounds, I am unable to accept the defendant's contention that there are triable issues. There are indeed no merits in this appeal. I therefore hold that the learned registrar's decision in entering summary judgment in favour of the plaintiff is correct which I hereby affirm. Hence, I dismiss this appeal with costs.

Appeal dismissed.

Reported by Loo Lai Mee